87-6177

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,

Petitioner

V.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM 1987

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QUESTIONS PRESENTED FOR REVIEW

1. At the punishment phase of a Texas capital murder trial, must the trial court upon a proper request, (a) instruct the jury that they are to take into consideration all evidence that mitigates against the sentence of death and (b) define terms in the three statutory questions in such a way that in answering these questions all mitigating evidence can be taken into consideration?

2. Is it cruel and unusual punishment to execute an individual with the reasoning capacity of a seven year old?

3. Given Penry's degree of mental retardation were his two confessions a voluntary relinquishment of his right to remain silent?

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JAMES A. LYNAUGH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at __F.2d__ (5th Cir. 1987). A copy of the opinion is attached as Appendix A. (p.A-1 to A-21).

The memorandum decision of the United States District Court for the Eastern District of Texas has not been reported. It is attached as Appendix B. (p. B-1 to B-49).

JURISDICION

Invoking federal jurisdiction under 28 U.S.C. §2254 and 28 U.S.C. §1254, petitioner filed a petition for writ of habeas corpus by a person in state custody in the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987. In a memorandum opinion the writ was denied on May 8, 1987 final judgment was entered and certificate of probably cause to appeal to the United States Court of Appeals for the Fifth Circuit was granted. The Fifth Circuit rendered its judgment denying relief on November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. (Appendix C). The Fifth Circuit has decided an important question of federal law which has not been but should be decided by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

and Art. 37.071 Texas Code of Criminal Proc. Ann.

> (b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that cause the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
> (4) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

STATEMENT OF THE CASE

Proceeding and Disposition in the Courts Below:

Penry was tried on a change of venue in the 258th Judicial District Court, Trinity County, Texas. The jury answered all three special issues yes and Penry was sentenced to death on April 18, 1980. His conviction was affirmed, in a published opinion, by the Court of Criminal Appeals of Texas May 1, 1985. Penry v. State, 691 S.W.2d 636 (Tex. Cr. App. 1985). Petition for Writ of Certiorari was denied by the United States Supreme Court on January 13, 1986. ___U.S._____, 106 S.Ct. 834 (1986). Writ of Habeas Corpus was denied by the Court of Criminal Appeals of Texas without written opinion on May 5, 1986. A Writ of Habeas Corpus under 28 U.S.C. §2254 was denied by the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987 with final judgment entered (ROA 3)[1] and certificate of probable cause granted on May 8, 1987. ROA 1. The United States Court of Appeals for the Fifth Circuit panel decision was rendered November 25, 1987.[2] Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987.

Statement of Facts

> "On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped, and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, ..."

Penry v. Lynaugh, ___ F.2d ____, slip opinion Appendix A p. A-2 (5th cir. Nov. 25, 1987).

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1. The number after ROA is the page number of the Record on Appeal filed in Fifth Circuit.
2. Due to his death Judge Hill did not participate in this decision.

Before she died she gave a description of her assailant. Two local sheriff's deputies decided the description was that of Johnny Paul Penry. They picked him up at his father's house took him first to the police station where they were joined by several other law enforcement officers, they all went back to the house where Penry lived and then to the crime scene. At the crime scene Penry made a verbal admission after which he was taken before a magistrate following which a statement was reduced to writing which Penry, a retarded illiterate, signed. The next day another more detailed statement was reduced to writing and signed by Penry. Slip opinion Appendix A p. A-1 to A-2.

At the punishment phase of Penry's trial the following objections were made to the jury instructions;

> OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.
>
> * * *
>
> OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."
>
> * * *
>
> OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.
>
> * * *
>
> OBJECTION 11: The next objection to the Court's Charge
>
> * * *
>
> is that the Court's Charge fails to instruct the jury to the following effect: "you may taken into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.
>
> * * *
>
> OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render

improbable that the Defendant can be rehabilitated.

(V.17 R. 2659 - 2664)[3]

These objections to the charge were overruled.

(V.17 R.2664 l. 20-22).

The mitigating evidence in Penry's case was discussed by the U.S. District Court below as follows;

> The evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.
>
> Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.
>
> Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

Memorandum opinion Appendix B p. B-3 to B-4.

ARGUMENT AND AUTHORITIES

The Texas Capital Punishmnet Statute as Applied to Penry was a Violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution

In finding that the execution of a mentally retarded person was not cruel and unusual punishment the United States District Court below found that mental retardation was nothing more than one of the mitigating factors to be considered. Appendix B p. B-5 to B-6. In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn questions;

> (b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of

3. The number after V. is the volume number of the state trial court record. The number after R. is the page number in that volume. The number after l. is the line number on the page. The state trial court record is an exhibit filed in this cause.

> the defendant in killing the deceased was unreasonable in response to to the provocation, if any, by the deceased.
> (4) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

Art. 37.071 Tex. Code Crim. Proc. Ann.

Any death penalty statute that fails to require that the trier of fact at the punishment phase must consider all mitigating circumstances before assessing the death penalty is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution's prohibition of cruel and unusual punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982), Woodson v. North Carolina, 428 U.S. 280 (1976) In Jurek v. Texas, 428 U.S. 262, 272 (1976) this Court held that although, The Texas Statute does not explicitly speak of mitigating circumstances, that,

> By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing functions.

428 U.S. at 276. This Court further observed that at that time,

> The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

id. at 272

Almost eleven years has past since Jurek was decided and not only has the Texas Court of Criminal Appeals failed to define the meanings of "criminal acts of violence" and "continuing threat to society" but is has also steadfastly refused to find error when, after timely motion by the defendant, the trial court has failed to instruct the jury on the meaning of these phrases. Penry v. State, 691 S.W.2d at 653-4, Cannon v. State, 691 S.W.2d 664, 667-8 (Tex. Cr. App. 1985), King v. State, 553 S.W.2d 105, 107 (Tex. Cr. App. 1977). In addition the Texas Court of Criminal Appeals has refused to find error, when after a timely motion by the defendant, the trial court has failed to instruct the jury that in answering the questions on the defendant's deliberateness and continuing threat to society they are to take into consideration all mitigating circumstances. Cordova v. State, 733 S.W.2d 175, (Tex. Cr. App. 1987), Clark v. State, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986), Stewart v. State, 686 S.W.2d 118, 126 Clinton dissenting (Tex. Cr. App. 1984).

Penry made a timely request for the following jury instructions:

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.

* * *

OBJECTION 11: The next objection to the Court's Charge.[4]

* * *

is that the Court's Charge fails to instruct the jury to the following effect: "you may taken into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

V.17 R. 2659 - 2664

In accordance with agreement these objections were reduced to writing and signed by Penry's attorneys. (V.17 R. 2664 l. 16-17). These objections to the Charge were overruled, (V.17 R. 2664 l. 20-22), and the Texas Court of Criminal Appeals found no error, holding all the requested terms were to be given their common definitions. Penry v. State, 691 S.W.2d at 653-4. [It should be noted that in Williams v. State, the Texas Court of Criminal Appeals

4. This Court granted certiorari in Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987) Cert. granted 56 U.S.L.W. 3287 (Oct. 9, 1987) on the question of whether a jury instruction like the one in this objection 13 must be given.

admitted that the term "deliberate" has a limited meaning. 674 S.W.2d 315, 322 (Tex. Cr. App. 1984).] The following Charge was then given the jury;

* * *

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the Jury's deliberations.

* * *

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * *

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

* * *

SPECIAL ISSUE NO.2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

* * *

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

TR. 117 - 118A[5]

Penry was permitted to argue all the mitigating circumstances to the jury but without any specific instructions from the Court as to where or how

5. The number after TR. is the page number of the state court Transcript included as an exhibit in this cause.

mitigating circumstances are to be applied in deciding the three special issues. Penry could only suggest to the jury that if they did not believe a mentally retarded person should get the death penalty they should pick one or more special issues and vote "no" even if they believed the answer should be yes. That is, Penry could only suggest jury nullification of the law. As the Court of Criminal Appeals tacitly admits in Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Cr. App. 1977), jury nullification is the only way all mitigating circumstances, can be taken into consideration by the Texas death penalty statute. See also Granviel v. Estelle 655 F.2d 673, 676 (5th Cir. 1981). Unless it is assumed Texas jurors will readily violate their oath to follow the law as given by the trial judge, having to depend on jury nullification places an intolerable burden on Penry. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek, 428 U.S. at 271. There is no reason to believe that Texas juries will not do as the judge did in Eddings v. Oklahoma, supra, and follow the law as they understand it by reading the charge and ignore any evidence that does not directly relate to the answering of the three issues given in the jury instructions. This is especially true since this is precisely what the state told the jury they were required to do during its final argument. (V.17 R. 2,688 l. 22-2690 l. 15).

The rationale used by the Texas Court of Criminal Appeals in holding no special instructions on mitigating evidence is required was discussed in Cordova v. State as follows:

> Our understanding of both Eddings [455 U.S. 104], supra, and Lockett [438 U.S. 586], supra, is that the Supreme Court did not mandate that a prospective juror must give any amount of weight to any particular fact that might be offered in mitigation of punishment, nor has our research to date revealed where this Court has ever laid down such a requirement. We believe that when properly read, Eddings, supra, and Lockett, supra, merely held that the fact-finder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the special issues. The decisions of the Supreme Court, and of this Court, do not, however, require an affirmative instruction that the fact-finder must give any specified weight to a particular piece of evidence, as appellant's counsel appears to contend. The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion exercised by each juror. See Adams v. Texas, supra, 448 U.S. at 46. Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.
>
> * * *

> Although the issue has been presented in may different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme, and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations. As previously pointed out, we find nothing in either Eddings, supra, or Lockett, supra, that would mandate the giving of a general or special instruction on mitigating evidence. E.g., Demouchette v. State, ____ S.W.2d ____ (Tex. Cr. App., No. 69,143, September 24, 1986). Also see Quinones v. State, 592 S.W.2d 933, 947 (Tex. Cr. App. 1980), in which this Court held that no such affirmative instruction was necessary because "The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required."

733 S.W.2d at 189-190.

The above discussion must be considered along with the fact that the jury panel in a capital murder case is still requested to take the following oath:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

§12.31(b) Texas Penal Code, even though no juror that refuses to take the oath will be disqualified. However, the jurors are not informed of this fact. Granviel v. State, 723 S.W.2d 141, 154-5 (Tex. Cr. App. 1986).

Although Granviel's argument was directed at the giving of the above oath over timely objection, his argument also should be considered in the light of the Texas Court of Criminal Appeal's refusal to instruct the jury on the consideration of mitigating evidence. Granviel's argument against giving the oath is as follows:

> Although the State has stopped questioning jurors about the oath required under 12.31(b) and therefore no one is excused for failure to take the oath (because they are not told they can avoid taking the oath), the harm attendant to administering the oath is still present. It does not make much sense to prevent some one from being excused for failure to take the oath because to do so would deprive the accused of a fair and impartial jury but then to allow the trial court to require the jury swear an oath not to let the imposition of the death penalty affect their deliberations. The oath not only violates the spirit of Adams v. Texas, supra, but also violates the tenets of Edmund [sic] v. Florida, supra, [458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140] in that it forces the jury to swear not to consider [sc. allow?] their feelings about the death penalty to affect their deliberations nor does the oath allow the jurors to consider mitigating evidence in determining whether to answer the questions yes or no. By giving the oath, the trial court has forced the jury to consider only the evidence which goes directly to the answering of the questions and to ignore the juror's feelings and arguments against the death penalty.

id. This argument was rejected. id at 155-6.

Further indications that the Texas Court of Criminal Appeals is applying the statutory question of Art. 37.071 in a manner that restricts the consideration of mitigating evidence are found in Gardner v. State, 730 S.W.2d 675 (Tex. Cr. App. 1987) and Drew v. State, __S.W.2d. _____, No. 69249 (Tex. Cr. App. Sept. 30, 1987). In Gardner a potential juror during voir dire was questioned on whether having found a person had intentionally killed some one she would automatically answer question No. 1, yes. After the potential juror first said she would, the state on cross-voir dire got her to say she would not, after which the trial judge cut off further questioning. 730 S.W.2d at 685 - 688. The Court of Criminal Appeals found;

> A venireman who fails to perceive a difference between "intentional" and "deliberate..." will certainly have problems reconsidering guilty stage evidence for its probativeness toward special issues, or for that matter, considering any new evidence presented at the punishment phase with the requisite degree of impartiality.
>
> Judging from its final pronouncement, the trial court was apparently of a mind that it is "entirely impossible" that any reasonable juror would fail to discern a difference between the statutory terms. That is hardly a tenable position in view of the fact that at least four current members of this Court would favor submitted a requested jury instruction which would instruct jurors, inter alia, that "the word 'deliberately' has a meaning different and distinct from the "intentionally" as that word was previously defined in the charge...

id. at 689. On December 9, 1987 the Texas Court of Criminal Appeals in Lane v. State __S.W.2d__, __n.7, No. 69, 254 (Tex.Cr.App. Dec. 9, 1987) admitted the term deliberate needs to be defined stating,

> V.T.C.A., Penal Code Sec. 6.03(a) sets out:
>
> "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. (emphasis added) It seems appropriate to comment here on how beneficial it would be to this Court in resolving voir dire points of error for the Legislature to accept its responsibility, and define the term "deliberately" as it is set out in Art. 37.071(b)(1)."

In Drew the Texas Court of Criminal Appeals held that a potential juror that would not answer Question No. 2 yes unless the state proved that the future dangerousness involved a danger to human life, could not follow the law stating; "Although the phrase 'criminal acts of violence that would constitute a continuing threat to society' is not defined in the Code of Criminal Procedure, there is nothing in our case law to limit this portion of Article 37.071(b)(2), supra, to future murders." Drew slip opinion at 4 - 6.

The voir dire in Gardner and the footnote in Lane illustrates the

difficulty involved in distinguishing intentional and deliberate. In Drew a potential juror who states he would consider it a mitigating factor if the States failed to prove future dangerousness to human life was excused for cause. Both cases illustrate the futility of relying on the statutory question as a vehicle for considering all mitigating evidence. This is particularly true in the light of the fact that Penry's jury, after a timely request, was given no instructions on the application of all mitigating circumstances.

The mitigating evidence in Penry's case was discussed by the U.S. District Court as follows;

> This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.
>
> Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.
>
> Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

Memorandum opinion, Appendix B p. B-3 to B-4. Without instructions on the necessity for considering all mitigating evidence and without proper definitions of terms it is simply impossible for Texas' three statutory questions to encompass all mitigating circumstances. In Jurek v. Texas, this Court upheld the three questions on the assumption that proper definitions would be forthcoming. 428 U.S. at 272. (1976.) None of the terms have been given definitions by the Texas Court of Criminal Appeals and no instructions on consideration of all mitigating evidence is ever given. The Texas Court of Criminal Appeals having defaulted on its promise, the Texas statute should be held a violation of the Eighth Amendment to the United States Constitution as applied. See Godfrey v, Georgia, 446 U.S. 420 (1980.) With jury nullification the only way for all the mitigating evidence to be considered, too great a burden was placed on Penry. By restricting the jury to answering the three statutory questions without any definitions of instructions on

consideration of all mitigating circumstances Penry's jury was just as effectively precluded from consideration of all mitigating evidence as was the Florida jury in Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987).

The Fifth Circuit in their decision questioned whether after Hitchcock the Texas Capital punishment statute was constitutional stating,

> It is therefore abundantly clear that a sentencing authority must not be precluded from considering any, or almost any, mitigating evidence. The issue here is what the term "consider" means. The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough:. "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but 'Lockett requires the sentencer to listen' to that evidence." [citation omitted]

Penry v. Lynaugh at A-10

In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn questions. Art. 37.071 Tex. Code Crim. Proc. Ann.

The Fifth Circuit discussed these questions as follows;

> The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? McCleskey, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? Brown, 107 S.Ct. at 841 (O'Connor, J., concurring).

> We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

> Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

id at A-11 to A-12.

> We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.
>
> The state argues that Penry's counsel could, and did, argue the mitigating circumstances to the jury. The defense attorney in Hitchcock also argued to the jury to "consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The prosecutor in Hitchcock then stood up and argued to the jury to consider the mitigating circumstances by number. Id. Likewise, here, the prosecutor was able to trump the defense counsel's argument:
>
> > I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the state's case because, ladies and gentlemen, I submit to you we've met our burden.
>
> As in Hitchcock, the mere fact that defense counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty. The prosecutor's argument would exclude that consideration.
>
> * * *
>
> We think that a strong argument can be made that developing law, see, e.g., Hitchcock, is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, see Brock v. McCotter, 781 F.2d 1152, 1157 n. 5 (5th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986), we are not free to do so because prior Fifth Circuit decision have rejected claims similar to Penry's. Riles v. McCotter, 799 F.2d 947, 952 - 53 (5th Cir. 1986); Granviel v. Estelle, 655 F.2d 673, 675 - 77 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982). The prior panel holdings bar a different holding by us.

id. at A-13 to A-14.

For the above reasons the Texas Capital punishment statue, as applied to Penry should be found to violate the Eighth Amendment as being cruel and unusual punishment.

Execution of a Mentally Retarded Person is Cruel and Unusual Punishment:

The United States Court of Appeals for the Fifth Circuit summarily rejected the argument that execution of a mentally retarded person is cruel and unusual punishment stating, "An identical claim has recently been rejected by this Court. Broqdon v. Butler, 824 F.2d 338 (5th Cir. 1987)." id. at A-3. This Court is presently considering if execution of a person that was 15 years old at the time of the crime is cruel and unusual punishment. Thompson v. Oklahoma, ____ U.S. ___, 107 S.Ct. 1284 (1987). This is a parallel issue.

Mental retardation is not the same type of mental defect as insanity. The two are vastly different mental defects. Mental retardation is defined as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.
>
> GENERAL INTELLECTUAL FUNCTIONING is defined as the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose.
>
> SIGNIFICANTLY SUBAVERAGE is defined as IQ more than two standard deviations below the mean for the test.
>
> ADAPTIVE BEHAVIOR is defined as the effectiveness or degree with which an individual meets the standards or personal independence and social responsibility expected for age and cultural group.
>
> DEVELOPMENTAL PERIOD is defined as the period of time between birth and the 18th birthday.

Manual on Terminology and Classification in Mental Retardation, 1977 Revision, Herbert J. Grossman, M.D., Editor, American Association on Mental Deficiencies, 5101 Wisconsin Ave., N.W., Washington, D.C. 20016, Publisher, p. 11. See also Standard 7-10.1 ABA Standard for Criminal Justice.

Since insanity and mental retardation are two different phenomena, the reasons why execution of an insane person and a mentally retarded person is cruel and unusual, are different. An insane person cannot be executed, because to execute someone that is so out of touch with reality that he is not aware of why he is being executed is cruel and unusual punishment. Ford v. Wainwright, ____ U.S. ____, 106 S.Ct. 2595, (1986). The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his mistake. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Standard 7-9.3 ABA Standard for Criminal Justice.

Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

In the Brief of Respondent-Appellee filed in the Fifth Circuit on pages C-2 to C-5 is a summary of Penry treatment by the Texas Mental Health/Mental Retardation (MHMR) system and penal system. When Penry was 9 years old MHMR became aware that Penry was mentally retarded, had been subjected to child abuse and had violent and aggressive tendencies. This initial contact was followed by five more essential identical diagnoses and treatment at three different MHMR facilities. Penry then spent 2 years incarcerated in the Texas Department of Corrections after which he was once again diagnosed by MHMR which recommended treatment at a halfway house. The diagnosis concluded that Penry was mentally retarded with antisocial tendencies. Starting when Penry was 9 years old and continuing for 12 years MHMR knew they were dealing with a mentally retarded child that had been subjected to child abuse and who had aggressive tendencies. In his early twenties this short, thin, (V.13 R. 1525 l. 20-22) person with the mental ability of a 6 or 7 year old spent two years in a prison system where, " ... inmates are routinely subjected to brutality, extortion, and rape by their cellmates." Ruiz v. Estelle, 679 F.2d 1115, 1141 (5th Cir. 1982). Penry is now on death row convicted of raping and murdering a woman. There can hardly be a more classic example of the failure of the Texas MHMR and prison system.

The Eighth Amendment to the U.S. Constitution assures that the State's power to punish is exercised within the limits of civilized society and central to any determination of whether punishment is cruel and unusual is the use of contemporary standards. Ford v. Wainwright, ___ U.S. ___ 106 S.Ct. 2595, 2600 (1986), Woodson v. North Carolina, 428 U.S. 280, 288 (1976). The U.S. District Court found that Penry's I.Q. was between 50 and 63, meaning he has the mind of a six or seven year old child and the social maturity of an eight and ten year old child. Memorandum opinion, Appendix B p. B-3 to B-4. This finding is adequately supported by the trial court record.

Contemporary standards can be determined by legislative enactments, court opinions, public opinion surveys and the position taken by recognized professional organizations. For at least the last 100 years Texas by statute

has prohibited the execution of a person that was under 17 years of age at the time of the offense. Tex. Penal Code Ann. § 8.07(d), Ex parte Walker, 13 S.W. 861 (1890). This Court in Ford v. Wainwright, _____ U.S. _____, 106 S.Ct. 2595 (1986) held the Eighth Amendment prohibits the execution of the insane. In so doing this Court used as its starting point the common law principal that, "[I]diots and lunatics are not chargeable for their own acts, ..." id at 2600. Under the common law,

> [An idiot is] a person who cannot account or number twenty pence, nor can tell who is his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 416 (1985).

A recent survey commissioned by Amnesty International found that in Florida 71% were against a mental retarded defendant being put to death while only 12% were in favor. ROA between pages 63 and 64. A study by Center for Public and Urban Research, Georgia State University obtained similar results. (See Rule 28 (J) Authority filed in the Fifth Circuit) January 10-12, 1986 at the Council Meeting of the American Association of Mental Deficiencies (AAMD) the Council unanimously endorsed the following resolution,

> The imposition of capital punishment on individuals with mental retardation raises troubling legal and moral issues. The AAMD supports legal reforms in the States that comport with the standard of civilized Common Law nations.

Mental Retardation, Vol. 24 No. 1 P.47 (ROA 126.)

Following the execution of Jerome Bowden in Georgia on June 24, 1986 the AAMD issued a press release condemning the execution. (ROA 128a). It should be noted that the AAMD is a professional association that has nearly 10,000 members.

The U.S. District Court, in denying relief on the cruel and unusual punishment ground, found that for Penry to be entitled to relief he would have to be so retarded that he was not competent to stand trial. Memorandum opinion at B-6 to B-7. This finding is not supported by the common law which held that the test was whether or not the person could learn by his mistakes. It is not supported by contemporary standards either. Accordingly to execute a person with Penry's degree of mental retardation would be cruel and unusual punishment.

Given Penry's Degree of Mental Retardation his two Confessions Were Not a Voluntary Relinquishment of his Right to Remain Silent.

Penry was the subject of a psychiatric examination performed by Jose G. Garcia, M.D., on February 25, 1980. Among other things Dr. Garcia concluded Petitioner, " ... is a person who can be made to say anything that he is asked under any slight pressure and can be so easily led." TR. 91. At the competency hearing, evidence of Penry's susceptibility to suggestions was presented. David Finch, who had known Penry since 1973 (V.6 R. 416 l. 22-23) testified Penry was very gullible (V.6 R. 421 l. 7-8) and:

> "He can be led in anything. Just like signing a confession. If somebody said, here, sign this or do this, he'd do it. If he felt you were superior, and had authority over him, he'd do it."

(V. 6 R. 435 l. 13-17).

Jerome E. Brown, Ph.D., a clinical psychologist testified that in 1973 Penry had been diagnosed as , "... subject to influence and manipulation by people more intelligent and sophisticated than he was." (V.6 R. 563 l. 1-3). There was documentation of a history of "... abuse and history of being taken advantage of, ..." (V.6 R. 564 l. 8- 9), and "They could coerce him into saying that he did things when he didn't do them." (V.6 R. 566 l. 9-10). "Ideas can be put into his head. Ideas can be taken away." (V6. R. 580 l. 6-7). "He'll tell you whatever story that he thinks is the right thing to say at that moment." (V.6 R. 620 l. 19-21).

Penry's confession taken by Ranger Cook (ROA 181 - 183) was the product of a mentally retarded person's desire to tell Ranger Cook, a person in authority, what Ranger Cook wanted to hear rather than an accurate confession.

The accuracy of the confession taken by Ranger Cook on 10-26-79 is questionable for the following reasons: (1) The victim of the attempted rape discussed in the last paragraph on ROA 181 did not identify Penry as the one that attempted to rape her. V. 17 R. 2617 l. 9-23; (2) In the first full paragraph on ROA 182 Penry confessed to raping another woman, threatened to kill her if she told the police and then a few weeks later he returned, beat her up and tried to kill her because she told the police, yet the rape was not reported to any of the law enforcement officials of Polk County. Respondent's Answers to Interrogatories No. 1(A) ROA 85-6. This portion of the confession reads like a six year old telling a "whopper." (3) The rape described in the second full paragraph of page 2 is inaccurate in that rather than turning

himself over to "2 guys who came by" the victim told two men who gave them a ride that she had been raped and the two men held Penry at gun point until two officers arrived. State's Answers to Interrogatories No. 2 ROA 86-7. In describing how he raped and killed the victim in the present offense Penry stated that the victim knocked a still open knife out of his hand. (Middle of ROA 183) The officer investigating the crime scene stated the knife on the floor at the scene was closed when found. V.4 R. 255 l. 15-20. If the rest of the rape and murder happened as described in the confession it is clear that Petitioner could not have picked up the knife, closed it and dropped it again.

Prior to Chief of Police William Smith taking Penry's statement, Petitioner had been read a "Miranda Warning" several times and had been taken before a magistrate where he was told he was charged with capital murder and given a standard "Magistrate's warning." V. 4 R. 204 l. 1-22. After which the magistrate asked Penry if he understood, Penry said he did, and the warning form was then handed to Penry to sign. V. 4 R. 205 l. 2-6. Penry's father spoke up to stop the signing, stating Penry could not read, his father then read the rights to Penry, asked him if he did it and after receiving an affirmative answer, told Penry "well you belong in jail, I'm gone." and Penry's father left. V. 4 R. 205 l. 3-207 l. 6. No detailed explanation of the warning was given Penry by the magistrate. V. 4 R. 212 l. 14-20.

After Penry was given the magistrate's warning Chief Smith and District Attorney Price read another warning to Penry from a form used to take statements. V. 4 R. 186 l. 4 - R. 188 l. 19. Penry stated he understood the warning. V. 4 R. 189 l. 2-12. The taking of Penry's statement started at 3:25 p.m. and ended at 6:05 p.m. V. 4 R. 193 l. 2-9. Neither the magistrate nor Chief Smith explained to Penry the seriousness of the charge "capital murder" or make any detail inquiry as to the extent Penry understood his constitutional rights. Chief Smith did testify at the trial on the merits that there was some explanation of Penry's rights. V. 14 R. 1831 l. 2 - R. 1833 l. 3.

The statement taken by Chief Smith was first taken in handwritten version which was then given to his secretary Alice Tieman to type. V. 14 R. 1836 l. 15 - R. 1837 l. 8. Alice Tieman was not present during the taking of the statement. V. 14 R. 1836 l. 19-21.

In Jurek v. Estelle, the Fifth Circuit stated,

> In considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.

623 F.2d 929, 937 (5th Cir. 1980).

* * *

> The concern in a case involving a defendant of subnormal intelligence is one of suggestibility. [Citations omitted] Doubtless, if the prosecutors pursue a specific object in the interrogation of such an accused, and the resulting confession bears the precise fruit of their aims, it will be doubly suspect.

* * *

> We must view incredulously, however, any suggestion that the second confession came directly from the accused. It is noteworthy that the second was taken in longhand by a prosecutor and then typed.
>
> The panel majority was doubtless correct in its statement that prosecution-composed confessions are highly suspect, particularly where the accused is of below normal intelligence, [Citations omitted]

id. at 938.

> We must be alert, as the panel majority stated, to the "manifest attitude" of the police toward the defendant. [Citations omitted] The Supreme Court has mandated "the most careful scrutiny" where the primary aim of prosecutors was "securing a statement from defendant on which they could convict [the defendant]" as opposed to solving the crime.

id. at 939.

In Cooper v. Griffin, the Fifth Circuit stated,

> The requirement of "knowing and intelligent" waiver implies a rational choice based upon some appreciation of the consequences of the decision. See Molignaro v. Smith, 5 Cir., 1969, 408 F.2d 795. Here the boys surely had no appreciation of the options before them or of the consequences of their choice. Indeed it is doubtful that they even comprehended all of the words that were read to them. Thus, they could not have made a "knowing and intelligent" waiver of their rights.

455 F.2d 1142, 1146 (5th Cir. 1972).

In Jurek the defendant was mildly retarded with possible organic brain damage. supra at 936. In Cooper the defendant had I.Q. in the 60 to 68 range. Mr. Penry is moderately to mildly retarded with possible organic brain damage with I.Q. of 50 to 60. Accordingly Penry is more severely retarded than the defendants in either Jurek or Cooper.

District Attorney Price stated that the reason Penry was given so many Miranda warning was that they wanted to be sure they got a statement that would hold up in court. V. 7 R. 830 l. 19 - R. 831 l. 7. Penry's susceptibility to pressure was discussed in the previous section. Nothing in

the record indicates that capital murder was ever explained to him in terms he could understand or that he was cautioned that signing the statement prepared by Chief Smith could be used to give him the death penalty. Chief Smith prepared Penry's statement in long hand and then had his secretary type it. This statement, accordingly, is highly suspect and was not the product of Penry's own free will, following a knowing and intelligent waiver based on a rational choice by Penry who at the time had little awareness of the consequences of signing the statement. The statement taken by Chief Smith should have been suppressed.

The argument and authority as to why the statement taken by Chief Smith should have been suppressed also applies to the statement taken by Ranger Cook with the exception that Ranger Cook typed the statement himself. However, Ranger Cook admitted he did not use Penry's exact words in the statement. V. 4 R. 227 l. 17-21. District Attorney Price was also present when Ranger Cook took the second statement. This statement was taken at District Attorney Price's suggestion because there was some additional information that was available then that was not available when Chief Smith took the first statement. V. 4 R. 234 l. 13-20. Ranger Cook spent 6 or 7 hours with Penry on the day he took the statement. V 15 R. 2014 l. 17-20. The additional information added at District Attorney Price's suggestion increased the probability that Penry would receive the death penalty rather than life in prison in that this additional information made Penry's actions appear more deliberate and he would appear more likely to continue committing acts of violence. In Jurek, the second statement was obtained for prosecutorial purposes in their drive for the death penalty. supra at 940. So too in Penry's case the second statement was taken for the purpose of obtaining the death penalty. This second statement should have been suppressed.

SUMMARY

For the above reasons this Petition for Writ of Certiorari should be granted and the Texas capital punishment statute as applied to Penry should be declared unconstitutional.

In the alternative the execution of a person with Penry's degree of mental retardation should be declared cruel and unusual punishment.

Penry's two confessions should have been suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Curtis C. Mason, Attorney for Petitioner-Appellant, do hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari, has been forwarded by United States Mail, postage prepaid, first class, to the Attorney General of Texas, P. O. Box 12548, Austin, Texas 78711, on this the 30th day of December, 1987.

Curtis C. Mason

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